Filed 5/30/19 P. v. Ahern CA1/2

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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE, Plaintiff and Respondent, v. PAUL ROBERT AHERN, Defendant and Appellant.	A151422 (San Mateo County Super. Ct. No. SC083818)

A jury convicted Paul Robert Ahern of second degree murder for killing Michael Anthony Gonzales on June 9, 2014. Ahern contends that the trial court erred by preventing him from presenting evidence of two 2005 incidents in which Gonzales became violent. He also claims the prosecutor engaged in misconduct during closing argument by mischaracterizing the jury instruction on self-defense. Finally, he asserts that he was prejudiced by a spectator's comment that he was "going down" because the trial court failed to inquire or admonish the jury about the outburst. We disagree with Ahern's arguments and affirm.

BACKGROUND

I.

Pre-Trial Proceedings

A complaint charged Ahern with murdering Gonzales on June 9, 2014, in violation of Penal Code section 187, subdivision (a). The complaint included a special allegation that Ahern "personally inflicted great bodily injury upon [Gonzales]" in violation of Penal Code section 1203.075, subdivision (a)(1).

Before the case could proceed further, the court suspended criminal proceedings and appointed doctors to determine whether Ahern was competent to stand trial. Ahern was sent to Napa State Hospital and remained there until May 27, 2015, when he was restored to competency. On August 20, 2015, the court held him to answer to the charge and special allegation. Ahern pleaded not guilty to the single-count information.

Ahern changed his plea from not guilty to not guilty by reason of insanity on May 26, 2016. After court-appointed doctors examined him, he withdrew his not guilty by reason of insanity plea and entered a not guilty plea.

A jury was sworn on February 28, 2017. The prosecution and defense presented evidence as described below.

II.

The Fight

Witnesses testimony is consistent about the following facts. The night Gonzales died, Ahern bought a 6.8-ounce bottle of vodka from One Stop Liquor in Redwood City at 6:23 p.m. and another one at 7:52 p.m. At some point before the fight, Ahern and Gonzales began chatting outside One Stop Liquor.

At about 8 p.m., Ahern and Gonzales started arguing and then physically fighting. A neighbor observed the men arguing from across the street. People began to pay attention as one slammed the other against a car before they fell to the ground. As they fell off the car, Ahern put Gonzales into the stranglehold that would kill him.

Ahern held Gonzales in that stranglehold for several minutes even though Gonzales was no longer fighting back. At least two bystanders tried to intercede, asking Ahern to let Gonzales go. When Ahern eventually let go, Gonzales was no longer responsive. Ahern stood near Gonzales's body until deputies arrived.

Deputies arrived within minutes after dispatch began receiving calls from witnesses. They found Gonzales lying face down on the street and Ahern standing nearby. One deputy confirmed Gonzales had no pulse and was not breathing. The deputies started chest compressions. Medical personnel soon arrived and took over. They attempted but could not revive Gonzales, who was declared dead at 8:45 p.m.

III.

Prosecution's Case-in-Chief

A. Denise Cortez

Denise Cortez, who lives across the street from One Stop Liquor, saw Ahern and Gonzales's argument when she went outside to look for something in her car. She recalled hearing Ahern make menacing statements like, "you gay Mexican, let's fight," and "I will beat you up." She went back inside her home when she could not find the item she was looking for in her car.

Less than five minutes later, Denise returned outside to "make sure the two gentlemen were okay." She saw the men start "swinging at each other," stating that Ahern threw the first punch, which landed on Gonzales's face. Gonzales began to walk away from Ahern without punching back but fought back after Ahern punched him three more times. Ahern picked up Gonzales and slammed him against a white car. Gonzales tried to move Ahern's arms away from his body and slammed Ahern against the white car.

Gonzales landed on top of Ahern as they fell off the car to the ground. Ahern placed Gonzales in a head lock for about 10 minutes. Gonzales was not moving. Ahern said, "somebody taken him off me, or I will kill him." Cortez called 911 and remained outside watching.

A minute or two before police arrived, Ahern got up and straightened out his clothing. The first police officer to arrive approached Ahern, arrested him, and put him in his police car.

B. Rhina Zepeda

A couple hours before the fight, Zepeda dropped off her son at the hair salon next to One Stop Liquor. When she returned, she saw Ahern and Gonzales fighting in the parking lot. Ahern had his left arm around Gonzales's neck and was hitting Gonzales. He then slammed Gonzales's head into a white car. Gonzales was still trying to defend himself.

Zepeda parked her car across from the salon and went inside. When she exited three minutes later, she saw that Ahern had his arms around Gonzales's neck and was squeezing it "very hard," at a 10 on a scale of 1 to 10. She said that Gonzales was no longer trying to defend himself and that his arms were "hanging limp." She got into her car and called the police.

The police dispatcher told Zepeda to look at what was happening, so she exited her car. She saw Gonzales lying, face down, on top of the car. Both men fell off the car and landed on the ground, with Ahern on top of Gonzales. After eight minutes, Ahern got off Gonzales, who was no longer moving.

C. Jaime Garcia-Nava

When Jaime Garcia-Nava arrived at One Stop Liquor, he saw two men who appeared drunk in the parking lot. As they were talking, Gonzales put his fingers in Ahern's mouth. Garcia-Nava went inside, purchased beer, and was about to leave when he saw Gonzales grab Ahern by the waist, lift him up, and push him onto the hood of a car. The men then fell off the side of the car. On the way down, Ahern grabbed Gonzales's neck and landed on top of Gonzales. Gonzales was barely moving his arms and feet, but he was no longer fighting.

Garcia-Nava asked Ahern to let Gonzales go. Ahern asked Garcia-Nava what he was going to do. Garcia-Nava said he was going to record him and then did so using his cell phone. That cell phone video was admitted at trial.

D. Bernice Centeno

Bernice Centeno was in the One Stop Liquor parking lot with Victor Cordova at 8 p.m. when she first saw two men fighting on the ground in the parking lot. She saw Ahern strangling Gonzales with one arm and hitting him with his other arm. Gonzales was face down, no longer moving. Centeno repeatedly told Ahern to let Gonzales go, but he refused, telling her, "get out of here, motherfucker." Centeno estimated that Ahern released Gonzales about 10 to 15 minutes later. Centeno heard Ahern say, "you're dead, you die," after letting Gonzales go. At some point while she was in the parking lot, Centeno called 911.

E. Victor Cordova

Victor Cordova was in the One Stop Liquor parking lot when Centeno and her daughter said that there was a fight. Cordova walked over to the fight, where he saw Ahern on top of Gonzales, with his leg over Gonzales's body. Ahern had his right arm around Gonzales's neck and his left arm on Gonzales's back. Gonzales still appeared to be breathing because he was opening his mouth. After five or six minutes, Gonzales stopped moving his mouth. Cordova tapped Ahern's shoulder and told him to let go in Spanish. Ahern told Cordova something along the lines of "get out of here, motherfucker, bitch." Cordova asked Centeno to call the police. Ahern let go of Gonzales when he heard a siren and said, "okay, you die."

F. Irma Pulido

Irma Pulido, the owner of the beauty salon near One Stop Liquor, was cutting hair when someone told her people were fighting outside. She went outside and saw two men on the ground, one with his arm around the other's neck. She watched the men for about 10 minutes, went back inside for 10 minutes, then went back outside. The darker-skinned man was no longer moving. A woman asked the other man to stop. Pulido went back inside her salon and later heard sirens.

G. Danilla Aguilera and Enmer Molina

Enmer Molina was the driver and Danilla Aguilera was the passenger in a car leaving a parking lot when they saw two people fighting across the street. Aguilera called the police after he saw the darker man—presumably Gonzales—on top of and hitting the man with white hair—presumably Ahern. Both Aguilera and Molina saw the men fall to the ground, with the darker-skinned man on top. Aguilera saw the darker man grab the white-haired man and hit him on the ground, but Molina did not.

H. Gonzales's Cause of Death

The forensic pathologist who conducted an autopsy of Gonzales's body concluded that he died of cardiac arrest due to an altercation in which a stranglehold was applied.

He noted that Gonzales had hypertrophic cardiomyopathy[1] and a blood-alcohol level of .33 percent. He opined that a stranglehold was a substantial factor in Gonzales's death because it constricted Gonzales's arteries and cut off air to his lungs. However, he conceded that the hypertrophic cardiomyopathy combined with the high blood alcohol level could possibly have caused Gonzales to go into cardiac arrest without being strangled.

I. Ahern's Physical Condition

Detective Scott Berberian examined Ahern at the scene. About two and a half hours after Gonzales died, he found out that Ahern had 0.063 blood-alcohol level with a portable testing device. Ahern had some injuries to his lower and middle back, but his neck appeared to be uninjured and was roughly the same red tone as his face.

Later that evening, Detective Hector Acosta also examined Ahern for injuries and saw none on Ahern's neck. He believed Ahern was sunburned.

A nurse practitioner at the San Mateo County Jail, who was working on June 11, 2014, examined Ahern. She saw that Ahern's neck was swollen on the right side and noted that Ahern felt sore on both sides.

J. Sarah Evanoff

Sarah Evanoff testified that she had lived with her brother, Gonzales, until 2012. After that, Gonzales lived with their sister until about six months before he died. Gonzales was homeless during the last six months of his life.

K. Prior Incidents of Violence by Ahern

The prosecution admitted testimony from three witnesses about five incidents involving Ahern that occurred a little over a year before the fight in this case.

Deputy Giannini testified that he had arrested Ahern twice for being drunk in public, once on March 18, 2013, and again on September 9, 2013. During the first arrest, Deputy Giannini responded to reports that Ahern was standing in traffic and yelling

[1] The physician explained that hypertrophic cardiomyopathy meant Gonzales had a "big muscular heart."

profanities at pedestrians and passing vehicles. During the second arrest, he responded to a restaurant where Ahern was yelling profanities.

Redwood City Police Sergeant Conover also arrested Ahern for being drunk in public twice, once on July 15, 2013, and again on February 21, 2014. During the first arrest, Sergeant Conover responded to reports that Ahern was acting irrationally and challenging passersby. During the second arrest, he responded to a dispatch call that Ahern was yelling profanities, pulling down his pants, and approaching women on the street.

Approximately six months before Ahern was arrested in this case, Garcia-Nava, who also witnessed Gonzales's death, encountered Ahern when he walked into a body shop while Garcia-Nava was working. Ahern asked if a customer's truck was for sale; Garcia-Nava responded that it was not. Ahern, who appeared very intoxicated, approached Garcia-Nava as he was operating a disk grinder and said, "Cut me." Garcia-Nava put the tool down and told Ahern to leave. Ahern eventually left.

IV.

Defendant's Case

A. Ahern's Testimony

The day of the fight, Ahern testified that he bought a small transistor radio with batteries. Afterward, he went to One Stop Liquor, where he purchased a half pint of vodka. He then sat down in front of Irma's Beauty Salon and began to drink while listening to the radio.

At some point, Gonzales joined him. Ahern finished the first bottle of vodka and purchased another at One Stop Liquor. Gonzales asked to borrow the radio to listen to the Giants game and sat around for a while with Ahern.

Later that afternoon, a kid approached them in the parking lot and asked if one of them would give him a dollar and buy a cigar for him. Ahern told the kid he would not buy him a cigar but had no problem giving him a dollar. Gonzales asked Ahern to give Gonzales the dollar, so Ahern gave it to him. Ahern then saw Gonzales walk towards the store. When Gonzales returned, he told the kid that he owed him a dollar. Ahern piped

up, said it was his dollar, and told the kid not to worry about it. Ahern testified that Gonzales walked away, returned and kicked him in the throat. Ahern described the kick as a "kill shot."

After being kicked in the throat, Ahern "grappled" with Gonzales because he feared for his safety. The next thing Ahern remembered was being "wrapped around" Gonzales, with his right arm around his head and neck. He vaguely recalled the police arriving and warning one officer not to shake his head or he could be next. He also remembered being arrested and feeling pain in his throat after the incident, but he could not recall being interviewed by police or appearing in court.

Ahern also discussed his hard-fought battles with mental illness. After his divorce and working long hours, in 2007 Ahern attempted suicide. A year later, police contacted Ahern and took him to a hospital because he had become disoriented and paranoid. When he was released from the hospital, he became disoriented again and was taken to another hospital. Sometime after being released, Ahern was later hospitalized again after trying to walk from his home in Menlo Park to San Francisco.

Ahern described having paranoid thoughts from around 2008 until he was hospitalized in this case. He suspected people were spying on him, so he disconnected cables for the television and wires from the Pacific Gas and Electric (PG&E) meter. He became homeless when he was about to be evicted from his family home.

While homeless, Ahern was assaulted on the streets. For example, one time, a man knocked him to the ground, stomped on his ribcage, and took his backpack. Ahern suffered a broken rib and punctured lung.

Ahern recalled being sent to Napa State Hospital after the fight. He began taking antipsychotic medication, which allowed him to regain clarity and realize that many of his beliefs were irrational.

B. Ahern's Brother

Ahern's brother, Tim Ahern,[2] testified about Ahern's difficult past, focusing especially on Ahern's lengthy mental health issues. Tim knew that Ahern was hospitalized for mental health issues in 2007 and 2008.

Tim also witnessed Ahern's delusional behavior when he visited the family home after Ahern had moved in. Ahern disconnected wires and power outlets. Ahern claimed his doctors were colluding with PG&E. He insisted that Jimmy Hoffa was living in the fireplace. After their father's death, Ahern told Tim that he suspected their mother was hiding their father somewhere in the house. Tim helped evict Ahern from the family home when he became too much for the family to handle.

After Ahern's arrest in this case, Tim visited Ahern at Napa State Hospital and noticed that he was able converse normally with Ahern, which he had not been in able to do for years.

C. Phillip Steiger

As discussed in greater detail during the section addressing the admission of past incidents evidencing Gonzales's violent character, Ahern introduced a video of Phillip Steiger's conditional examination.[3] Steiger, who was Gonzales's former roommate, stated that Gonzales had once punched him in the face without provocation.

D. Forensic Alcohol Expert

Forensic alcohol expert Kenton Wong testified about Ahern's blood-alcohol level the night of the fight. Wong explained that someone who tested as having a blood-alcohol level of 0.063 percent at 11:14 p.m. would have had a blood-alcohol level of

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[2] We refer to Tim Ahern as "Tim" to distinguish between him and his brother and in doing so mean no disrespect.

[3] The conditional examination was conducted under Penal Code section 1336, which allows a defendant to secure a material witness's testimony in advance for several reasons, including if the witness "is so sick or infirm as to afford reasonable grounds for apprehension that he or she will be unable to attend the trial." Here, the court granted Ahern's motion to secure Phillip Steiger's testimony in advance because Steiger was homeless and had health issues.

around 0.14 percent at around 8:00 p.m. assuming an hourly burn-off rate of 0.02 percent. Wong testified that someone of Ahern's size needed to consume at least seven drinks to have a blood alcohol level of 0.14 percent.

Wong also explained that Gonzales had a blood-alcohol level of 0.33 percent, which would have required him to consume at least 17 drinks. Given his blood-alcohol level, Gonzales would have been extremely mentally and physically impaired.

E. Psychiatric Expert

Dr. George Wilkinson, who concluded Ahern was incompetent to stand trial in 2014, testified for the defense. Dr. Wilkinson explained that Ahern was incompetent to stand trial because he was psychotic in September 2014. When Dr. Wilkinson evaluated Ahern again after he was treated at Napa State Hospital, he found that Ahern was able to have a "more reasonable conversation" and no longer exhibited "outbursts of anger."

For his second evaluation, Dr. Wilkinson reviewed Ahern's medical history, which covered many of the incidents about which Ahern had testified. Dr. Wilkinson diagnosed Ahern as a high-functioning individual on the schizophrenic and delusional spectrums. He opined that Ahern was in a dissociative state during the fight, resulting from his mental illness, intoxication and distress. His dissociative state accounted for his unusual memory gaps.

V.

Verdict and Sentence

The jury returned its verdict on Tuesday, March 14, 2017, finding Ahern guilty of second-degree murder. Ahern waived a jury trial on the special allegation, and the trial court found it to be true.

DISCUSSION

I.

The Trial Court Did Not Abuse Its Discretion When It Declined to Admit Additional Evidence of the Victim's Character.

Ahern asserts that the trial court incorrectly declined to permit him to introduce under Evidence Code section 1103 two violent altercations involving Gonzales that

occurred in 2005. Ahern contends that his inability to introduce these two prior violent altercations deprived him of his constitutional right to present a defense.

A. Violent Incidents Ahern Sought to Admit Under Evidence Code Section 1103

Defense counsel filed a motion in limine to admit evidence of four prior incidents involving violent conduct by Gonzales under Evidence Code section 1103, subdivision (a), specifically two incidents from 2005 and two from 2012. The prosecutor objected to this evidence, and the trial court heard argument on Ahern's motion. At the outset of the hearing, the trial court explained it was tentatively inclined to admit the 2012 incidents and to exclude the 2005 incidents based on Evidence Code section 352, which permitted it to "exclude evidence if its probative value is substantially outweighed by the probability that its admission will (a) necessitate undue consumption of time or (b) create substantial danger of undue prejudice, of confusing the issues, or of misleading the jury."

During that hearing, defense counsel detailed each incident. For the first 2005 incident, he explained that Gonzales's nephew had asked Gonzales, who was drunk, to cut his hair. When Gonzales's nephew asked Gonzales to hurry up, Gonzales struck him in the head and shoulders. Gonzales's sister, Sarah Evanoff, also witnessed this incident. In the other 2005 incident, a man urinated on the front fence of his family's home, and Gonzales hit him with a bat. Defense counsel added that one of those two incidents may have taken place in 2007, not 2005, without specifying which one.

Defense counsel then said that the first 2012 incident involved Gonzales striking Phillip Steiger, with whom he was sharing a trailer, because Gonzales believed that Steiger had "disrespected his family." During the other 2012 incident, a defense investigator encountered a very intoxicated Gonzales while looking for another person. Gonzales became aggressive, acting as if he was about to physically confront him, until another person intervened.

After hearing from both parties, the trial court concluded that past incidents of violence by Gonzales, "notwithstanding its lack of connection to anything the defendant

is aware of, [are] admissible." The trial court proceeded to engage in a balancing analysis under Evidence Code section 352. It concluded that the 2005 incidents were "substantially more prejudicial and possibly confusing and possibly just nowhere near as probative as they need to be under [Evidence Code section] 352 for [the trial court] to admit them." The trial court concluded, however, that the 2012 incidents were closer in time to 2014 and were therefore admissible.

As summarized above, Ahern ultimately only introduced evidence of a single 2012 incident, the one in which Gonzales hit Phillip Steiger. Steiger, who had previously lived with Gonzales, stated that Gonzales had once come into the camper they shared drunk and punched him in the face while he was sleeping. Steiger said that he still had a scar on his lip caused by a tooth going through his lip when Gonzales punched him. Steiger also testified that he had seen Gonzales act irrationally once but claimed he never knew him to be violent.

In addition, defense counsel confronted Evanoff, who had witnessed the 2005 incident, with her earlier statement to police that Gonzales could become violent when intoxicated. She responded that Gonzales would get more "verbal," by which she meant, "[j]ust loud, obnoxious, turning the radio on loud . . . . just being stupid, drunk." But no evidence of the 2005 incident that she witnessed was introduced.

B. The Trial Court Did Not Abuse Its Discretion When It Declined to Admit Two Older Incidents of Violence by the Victim.

Ahern claims that the two 2005 incidents were admissible under Evidence Code section 1103 and that the trial court's ruling that the two 2005 incidents were too remote was legally incorrect. "We review a trial court's decision to admit or exclude evidence 'for abuse of discretion, and [the ruling] will not be disturbed unless there is a showing that the trial court acted in an arbitrary, capricious, or absurd manner resulting in a miscarriage of justice.' " (*People v. Powell* (2017) 5 Cal.5th 921, 951, citing *People v. Wall* (2017) 3 Cal.5th 1048, 1069.)

Evidence Code section 1103 subdivision (a)(1) allows a defendant to offer character evidence of a victim "to prove conduct of the victim in conformity with the

character or trait of character" unless it is inadmissible under Evidence Code section 352. As previously mentioned, a trial court may exclude evidence under Evidence Code section 352 if its " 'probative value is substantially outweighed by the probability that its admission will (a) necessitate undue consumption of time or (b) create substantial danger of undue prejudice, of confusing the issues, or of misleading the jury.' " (*People v. Shoemaker* (1982) 135 Cal.App.3d 442, 448 (*Shoemaker*), quoting Evid. Code, § 352.)

For example, in *Shoemaker*, the trial court excluded evidence of a victim's violent character that the defendant sought to admit under Evidence Code section 1103, subdivision (a)(1), after applying Evidence Code section 352. In that case, the defendant, who was accused of repeatedly stabbing a victim, wanted to introduce testimony from a couple the victim had assaulted. (*Shoemaker*, *supra*, 135 Cal.App.3d at pp. 445, 449.) When the trial court excluded the evidence, it explained that the couple's testimony had "little probative value, would be cumulative and prejudicial, and would confuse the jury and consume too much time." (*Id.* at p. 445.) Nevertheless, the trial court "took judicial notice of the pending charges against [the victim] arising out of that incident and read them to the jury: Single counts of burglary, attempted robbery, and attempted murder, as well as various weapons charges." (*Ibid.*) It further allowed the defense to present two witnesses "to testify that [the victim] was violent and dangerous, and had assaulted both his ex-wife and a former girl friend [*sic*]." (*Ibid.*)

On appeal, the defendant argued that the trial court had abused its discretion by excluding the couples' testimony of the victim's assault, which would have proven the victim's tendency to act violently without provocation and supported his contention that the victim attacked the defendant. (*Shoemaker, supra,* 135 Cal.App.3d at p. 449.) The Court of Appeal disagreed and affirmed. (*Id.* at pp. 449-450.) Citing language from Evidence Code section 352, it agreed with the trial court that the couple's testimony would have resulted in an undue consumption of time, confused the jury, and was cumulative of other evidence presented about the victim's violent character. (*Ibid.*)

Evidence of a victim's character also may be excluded under Evidence Code section 352 as being too remote in time to have any probative value. For instance, in

People v. Gonzales (1967) 66 Cal.2d 482, two groups of men took part in a knife fight that left one man dead and another severely injured. (*Id.* at pp. 485-486.) The defendants were convicted of first degree felony murder because a victim's wallet was taken during the fight. (*Ibid*.) The defendants claimed evidence demonstrating one victim's propensity for violence was improperly excluded because it was highly probative of their self-defense claim. (*Id.* at p. 499.) Our Supreme Court affirmed the trial court's exclusion of that evidence because the event during which the victim had been violent had taken place seven years earlier and thus "was too remote to have present probative value." (*Id.* at p. 500.)

Turning to this case, Ahern sought to admit two incidents demonstrating Gonzales's violent character in 2005 and/or 2007 to show that Gonzales was the aggressor on the night he died. These events, which took place seven to nine years prior to the charged incident, are at least as stale as the incidents our Supreme Court held were too remote in *Gonzales*. (*People v. Gonzales*, *supra*, 66 Cal.2d at p. 500.) They are also cumulative of the 2012 incident that was admitted at trial. Thus, the trial court did not abuse its discretion in excluding the two earlier incidents as too remote to be probative and also as cumulative.

Relying on two distinguishable cases, *People v. Davis* (2009) 46 Cal.4th 539 and *People v. Mendoza* (2000) 78 Cal.App.4th 918, Ahern contends that the trial court was legally incorrect because trial courts "frequently admit prior[] [incidents under Evidence Code section 1103] older than that." In *Davis*, our Supreme Court permitted 17-year-old evidence of a defendant's violent character because, the "defendant had only remained free from incarceration for a total of three years during the intervening period." (*Davis*, at p. 602.) But unlike *Davis*, there is no evidence that Gonzales was incarcerated and therefore unable to commit additional acts of violence in the years between 2005 and 2014. And *Mendoza* is even less relevant because it concerned admission of prior convictions to attack witness credibility under Evidence Code section 788, not admission of victim character evidence under Evidence Code section 1103, subdivision (a)(1). (*Mendoza*, at pp. 723-728.)

Relying on *People v. Fuiava* (2012) 53 Cal.4th 622 (*Fuiava*), Ahern further contends that he was entitled to a "level playing field" because the prosecutor admitted evidence of *his* violent character. (*Id.* at p. 696.) But the prosecutor admitted evidence that Ahern was violent under Evidence Code section 1103, subdivision (b), only because Ahern admitted evidence of victim's violent character under Evidence Code section 1103, subdivision (a)(1)). The evidence against Ahern was also more recent, having all occurred in the year and a half prior to the fight, and therefore more relevant than the two excluded Gonzales incidents, dated nine years (or in one case possibly seven years) prior to the murder.

Ahern also takes *Fuiava*'s "level playing field" statement out of context. *Fuiava* does not require parity of evidence, it requires a defendant to make a strategic choice of which course to follow with the knowledge that certain evidence will or will not come before the jury depending on the defendant's trial strategy. (*Fuiava*, *supra*, 53 Cal.4th at p. 698.) In other words, Evidence Code section 1103 creates a level playing field because the jury is provided with evidence allowing it to develop "a balanced view of the possible violent tendencies of both the victim and the defendant." (*Fuiava*, at p. 698.)

In sum, we conclude the trial court did not abuse its discretion by excluding the 2005 incidents under Evidence Code section 352.

C. Ahern Was Still Able to Present His Defense.

Ahern asserts that the trial court's ruling excluding the two earlier incidents improperly deprived him of the opportunity to present a full defense, thereby violating his constitutional rights under the Fifth, Sixth and Fourteenth Amendments. He further appears to claim that the trial court's ruling violated the federal due process clause by failing to hold the prosecution to its burden to prove that he did not act in self-defense. We evaluate evidentiary errors implicating the defendant's Fifth, Sixth and Fourteenth Amendment rights for prejudice under a "harmless beyond a reasonable doubt" standard. (*Chapman v. California* (1967) 386 U.S. 18, 24.) Under this standard, "the beneficiary of a constitutional error [must] prove beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained." (*Ibid.*)

A criminal defendant has the right to present a defense but does not have an unfettered right to offer evidence that is otherwise inadmissible under the rules of evidence. (*Taylor v. Illinois* (1988) 484 U.S. 400, 410.) As the Supreme Court has explained, "[t]he adversary process could not function effectively without adherence to rules of procedure that govern the orderly presentation of facts and arguments to provide each party with a fair opportunity to assemble and submit evidence to contradict or explain the opponent's case." (*Id.* at pp. 410-411.) "As a general matter, the '[a]pplication of the ordinary rules of evidence . . . does not impermissibly infringe on a defendant's right to present a defense.' " (*People v. Fudge* (1994) 7 Cal.4th 1075, 1102-1103, citing *People v. Mincey* (1992) 2 Cal.4th 408, 440, and *People v. Hall* (1986) 41 Cal.3d 826, 834.)

Here, Ahern presented his desired defense, albeit not with every incident requested. Although completely excluding evidence supporting an accused's defense could rise to the level of a due process violation, the rejection of some evidence concerning the defense does not. (*People v. Fudge*, *supra*, 7 Cal.4th at pp. 1102-1103.) Not only was Ahern permitted to present evidence of the victim's violent character, he also testified that the victim kicked him in the throat, that Ahern acted out of fear for his own safety, that he had been attacked and seriously injured while homeless and that he suffered from mental illness that included paranoia. His expert witness also testified that he was mentally ill and in a dissociative state at the time of the incident. Ahern thus had ample opportunity to and did present his self-defense theory. His "attempt to inflate garden-variety evidentiary questions into constitutional ones is unpersuasive." (*People v. Boyette* (2002) 29 Cal.4th 381, 427.)

Ahern alternatively appears to suggest that the exclusion of these two incidents somehow shifted the burden to him to prove beyond a reasonable doubt that he acted in self-defense. Citing *People v. Rios* (2000) 23 Cal.4th 450, Ahern argues that his only burden is to present evidence of a defense sufficient to raise a reasonable doubt that he murdered Gonzales. (*Id.* at pp. 461-462.) That is true, and the jury was so instructed. We therefore reject this argument.

II.

Prosecutor's Remarks During Closing Argument Did Not Misstate the Law.

Ahern contends the prosecutor "misstated the law when he argued against this being a self-defense case," pointing to the prosecutor's argument that Ahern allegedly had to "prove that Gonzales had a gun in order to accept self defense if it believed [Ahern] had not retreated from the fight or had 'stood his ground.' " He also claims his counsel was ineffective for failing to object to that argument.

A. The Prosecutor's Closing Argument and Relevant Jury Instructions

Before closing argument, the trial court read the "Justifiable Homicide: Self-Defense or Defense of Another" jury instruction to the jury. Specifically, the court instructed that jury that:

"The defendant is not guilty of murder or manslaughter if he was justified in killing someone in self-defense. The defendant acted in lawful self-defense if, one, the defendant reasonably believed that he was in imminent danger of being killed or suffering great bodily injury; two the defendant reasonably believed that the immediate use of deadly force was necessary to defend against that danger; and, three, the defendant used no more force than was reasonably necessary to defend against that danger.

"Belief in future harm is not sufficient, no matter how great or how likely the harm is believed to be. The defendant must have believed there was imminent danger of death or great bodily injury to himself. Defendant's belief must have been reasonable, and he must have acted only because of that belief. The defendant is only entitled to use that amount of force that a reasonable person would believe is necessary in the same situation. If the defendant used more force than was reasonable, the killing was not justified.

"When deciding whether the defendant's beliefs were reasonable, consider all the circumstances as they were known to and appeared to the defendant and consider what a reasonable person in a similar situation with similar knowledge would have believed. If the defendant's beliefs were reasonable, the danger does not need to have actually existed.

[¶] . . . [¶]

"A defendant is not required to retreat. He or she is entitled to stand his or her ground and defend himself or herself and, if reasonably necessary, to pursue an assailant until the danger of death or great bodily injury has passed. This is so even if safety could have been achieved by retreating."

At the beginning of his closing argument, the prosecutor advised the jury that "[t]he instructions that you actually were read control if there's any discrepancy." He then addressed the facts and how the jury instructions applied to them, arguing, among other points, that Ahern had not acted in self-defense.

The prosecutor focused on two points when arguing that Ahern had not acted in self-defense: Ahern's prolonged strangulation of Gonzales and Ahern's comments that he wanted to kill Gonzales. With respect to his first point, the prosecutor asserted that the "right to self-defense extinguishes once the danger has passed," and that "[Ahern] does not get to keep strangling [Gonzales] once any danger that's there passes." But even after Gonzales was no longer a threat, the prosecutor contended that Ahern continued to strangle him as he "gasp[ed] for air for . . . five minutes" and went "limp." The prosecutor revisited the same argument later, describing Ahern as "choking out a limp body for . . . approximately five . . . minutes [while] according to Mr. Cordova[,] the victim [was] gasping for air." Again, the prosecutor concluded by arguing that "[t]he danger in this case had long passed. He's not fighting back in that video. . . . [T]hat fight's over."

Turning to his second point, the prosecutor contended that Ahern's statements proved that the continued strangulation was because Ahern intended to kill Gonzales, not because he acted out of self-defense. As he explained, Ahern "said he was going to kill him, he proceeded to get him in that strangle hold, [and] he held him in that strangle hold for a long period of time. And while he was doing that, he said, *I'm going to kill him*. Get him off me or *I'm going to kill him*. And as he finished, he said, *you're dead, you die*." (Italics added.)

The prosecutor then brought these points together as he finished argument, saying,

"[O]nce they are on the floor, this fight is done. He could have and he should have let go, but he did not. He strangled a man who was gasping for air for a substantial period of time. As he went off, and insulted, and brushed off people that were trying to break them up. [¶] Threatened people that were trying to break them up. Yelling out that he was going to kill the man. Evidencing his premeditation and deliberation by saying things, [like] if you don't get him off me, I'm going to kill him."

As a minor point in his closing, the prosecutor also argued that Ahern did not act in self-defense because Gonzales no longer posed a threat when he began to walk away earlier in the fight. Although somewhat inartful, the prosecutor said,

"Fear of death is insufficient to justify a homicide. Just because he might be scared, that's not enough. And by his own account where he actually engages, he's not scared. He's angry. It can't be future harm, it must be an imminent harm.

"And the same fear has to be present in a reasonable person. And he has to act under the fear of death alone.

"The danger that we are talking about has to be apparent, present, immediate, and needs to be dealt with. It has to appear to be reasonable to the person doing the killing.

"A reasonable person here wouldn't believe those things. The victim was walking away. The defendant starts to fight. Either that or at best, the defendant reengages. He follows him down where he's walking away. He's not in a fighting stance.

"Also in there is a stand your ground instruction. This is not a stand your ground case. Stand your ground, made famous from the Florida cases, but it talks about the need to pursue in order to stop future—the further harm. That's not this. Here, under the best scenario possible to the defendant, he was kicked in the throat, the victim is walking away, there's no threat there. There's no need to continue to stop him.

"Where that tends to come [in] is where you have an armed assailant. Michael Gonzales kicked him in the neck and had a gun out, and he thought he was about to be shot and there's something that's about to happen to him, then you have that. That's not this. The need to pursue is just simply not there.

"Again, you've got the defendant saying he's going to kill him before he throws the first punch. Not self-defense. When people tried to interview [*sic*], when Bernice Centeno and Mr. Cordova went up and tried to intervene, he swears at them. Mother fucker, bitch, I think those are the ones that they testified to.

"And you've got to remember under the circumstances, they are there trying to intervene on a guy that they see strangling out a completely limp person. It's scary."

Ahern now objects to the italicized language, even though counsel did not object to it at trial.

B. The Prosecutor Did Not Misstate the Law.

Ahern asks this court to hold that the prosecutor misstated the law on self-defense even though his counsel failed to object. "Generally, a reviewing court will not review a claim of misconduct in the absence of an objection and request for admonishment at trial." (*People v. Gionis* (1995) 9 Cal.4th 1196, 1215.) The only exception is that such misconduct remains reviewable if "an admonition would not have cured the harm." (*People v. Price* (1991) 1 Cal.4th 324, 447.) As the trial court could have resolved this issue by admonishing the jury that its interpretation of the law governed, we conclude the present claim should be "disregarded on procedural grounds because defense counsel failed to assign misconduct and request appropriate admonitions." (*Gionis*, at p. 1215.)

But because Ahern has argued his counsel was ineffective in failing to object, we will address the merits and conclude that it fails. A prosecutor's conduct violates the Fourteenth Amendment to the federal Constitution when it " 'infects the trial with such unfairness as to make the conviction a denial of due process.' " (*People v. Coffman & Marlow* (2004) 34 Cal.4th 1, 92, citing *People v. Morales* (2001) 25 Cal.4th 34, 44.) The standard under California law is lower because the prosecutor's conduct does not need to render a criminal trial fundamentally unfair, but it still must involve " ' "the use of deceptive or reprehensible methods to attempt to persuade either the court or the jury." ' " (*People v. Farnam* (2002) 28 Cal.4th 107, 167, citing *People v. Espinoza* (1992) 3 Cal.4th 806, 820.)

Even under California law, "[a]dvocates are given significant leeway in discussing the legal and factual merits of a case during argument. [Citation.] However, 'it is improper for the prosecutor to misstate the law generally [citation], and particularly to attempt to absolve the prosecution from its . . . obligation to overcome reasonable doubt on all elements [citation].' [Citation.] To establish such error, bad faith on the prosecutor's part is not required. [Citation.] '[T]he term prosecutorial "misconduct" is somewhat of a misnomer to the extent that it suggests a prosecutor must act with a culpable state of mind. A more apt description of the transgression is prosecutorial error.' " (*People v. Centeno* (2014) 60 Cal.4th 659, 666-667 (*Centeno*).)

To establish that the prosecutor's arguments were inappropriate, Ahern must show that, " '[i]n the context of the whole argument and the instructions' [citation], there was 'a reasonable likelihood the jury understood or applied the complained-of comments in an improper or erroneous manner. [Citations.] In conducting this inquiry, we "do not lightly infer" that the jury drew the most damaging rather than the least damaging meaning from the prosecutor's statements.' " (*Centeno*, *supra*, 60 Cal.4th at p. 667.) " ' "The argument may be vigorous as long as it amounts to fair comment on the evidence, which can include reasonable inferences, or deductions to be drawn therefrom. [Citations.] It is also clear that counsel during summation may state matters not in evidence, but which are common knowledge or are illustrations drawn from common experience, history or literature." ' " (*People v. Williams* (1997) 16 Cal.4th 153, 221.)

To justify an act of self-defense, a defendant must have possessed a reasonable belief that he was in imminent danger of death or great bodily injury to himself and must have acted only because of that belief. (CALCRIM No. 505.) That reasonable belief of imminent harm is based on the defendant's perception. (*People v. Humphrey* (1996) 13 Cal.4th 1073, 1094.) "The jury must evaluate such perceptions in context, i.e., the 'same or similar circumstances' as those in which the defendant acted." (*Ibid.*) For the harm to qualify as imminent, " ' "[t]he peril must appear to the defendant as immediate and present and not prospective or even in the near future. An imminent peril is one that, from appearances, must be instantly dealt with." . . . [¶] This definition of imminence

reflects the great value our society places on human life.' " (*In re Christian* S. (1994) 7 Cal.4th 768, 783, italics omitted, citing *People v. Aris* (1989) 215 Cal.App.3d 1178, 1187.)

However, the law limits who can validly assert self-defense. " 'It is well established that the ordinary self-defense doctrine—applicable when a defendant *reasonably* believes that his safety is endangered—may not be invoked by a defendant who, through his own wrongful conduct (e.g., the initiation of a physical assault or the commission of a felony), has created circumstances under which his adversary's attack or pursuit is legally justified.' " (*People v. Hardin* (2000) 85 Cal.App.4th 625, 630.)

Here, the prosecutor contended that Ahern could not assert self-defense because he was either the person who started the fight or he was the person who re-engaged in the fight after the danger had passed. The prosecutor relied heavily on Cortez's testimony to argue that Ahern either started the fight or, at best, decided to reengage Gonzales who had started to walk away. Assuming Gonzales initially walked away, the danger facing Ahern had diminished much like the danger in *People v. Perez* (1970) 12 Cal.App.3d 232 (*Perez*). In *Perez*, the defendant was injured when he resisted an officer who was booking him for driving under the influence of alcohol. (*Id.* at p. 234.) After booking, that officer allowed defendant to make a call. (*Ibid.*) When he finished his call, the defendant attacked the officer from behind. (*Ibid.*) The Court of Appeal determined that the defendant's attack was unjustified because the danger had passed as his attacker (the officer) had withdrawn. (*Id.* at p. 236.) Cortez testified that Ahern hit Gonzales repeatedly as Gonzales was walking away. Assuming the jury believed that testimony, then here, as in *Perez*, Ahern could not assert he was acting in self-defense when he re-engaged.

Ahern, however, contends, that the prosecutor misstated the law when he said that the need to re-engage "tends to come [in] . . . where you have an armed assailant." But the word "tends" suggests that the situation would be more likely if assailant was armed, not that the assailant must be armed. It is not tantamount, for example, to a misstatement that a defendant was required to retreat unless Gonzales was armed, which would have

been incorrect. (*People v. Rhodes* (2005) 129 Cal.App.4th 1339, 1347 [finding prejudicial error where jury instruction and prosecutor said a convicted felon defendant did not have the right to stand his ground and not retreat]).

Furthermore, this argument was a minor point compared to the prosecutor's main contentions that Ahern strangled a nonresponsive Gonzales for several minutes after the danger had passed and that Ahern's statements reflected his intent to kill Gonzales. The prosecutor's primary theory did not hinge on Ahern re-engaging Gonzales as he walked away.

Ahern nevertheless claims that the jury would have found his belief of imminent harm to be reasonable but for this argument by the prosecutor. He adds that his fear was reasonable based on "the aggression involved, the youth and size advantage that Gonzales had, [his] mental illness and his state of intoxication as well as his previous experiences with being severely injured in other beatings."

But, again, Ahern's argument fails because the prosecutor's singular comment about firearms, made once as a small part of a much larger discussion, only provided an example of the level of danger necessary to re-engage based on imminent fear. The jury was not required to accept Ahern's version of events including his claim that he feared imminent harm because Gonzales had kicked him in the neck. (*In re Christian S., supra,* 7 Cal.4th at p. 783.) Nor is it likely that the prosecutor's argument prevented the jury from accepting Ahern's version of events given the many witnesses whose testimony contradicted Ahern's.

Finally, even if the prosecutor misstated the law—and again, we conclude the prosecutor did not—we note that the trial court correctly instructed the jury about the law on self-defense and advised that "any statement by an attorney inconsistent with the court's instructions as to the law must be disregarded." (*People v. Coffman & Marlow, supra,* 34 Cal.4th at p. 93.) As the jury was properly instructed on those two points, "there was no reasonable likelihood any juror would have applied the prosecutor's comments erroneously." (*Ibid*.)

C. Defense Counsel Was Not Ineffective for Failing to Object to Prosecutor's Argument.

Ahern claims his counsel was ineffective for failing to object to the prosecutor's closing argument. "It is well settled that counsel is not ineffective in failing to make an objection when the objection would have likely been overruled by the trial court." (*People v. Mendoza* (2000) 78 Cal.App.4th 918, 924.) Here, since the prosecutor's argument did not mischaracterize the law, we conclude that "no comment [during closing argument] . . . would have compelled competent counsel to object." (*People v. Riel* (2000) 22 Cal.4th 1153, 1198.) Ahern's ineffective assistance of counsel claim accordingly fails.

III.

Ahern's Right to a Fair Trial Was Not Violated by Spectator Comments.

A. Spectator Outburst

During a brief recess and out of the presence of the jury, defense counsel informed the trial court that one of Gonzales's sisters, Layla Rock, who was observing the trial, had been giving defense counsel "hard looks." Defense counsel further described her as appearing to be "emotional and somewhat upset." He also claimed that a man who sat down next to Gonzales's sister had said in a voice loud enough for defense counsel to hear, "You're going down, Pony." Defense counsel brought this to the trial court's attention but did not ask the court to take any particular action. The trial court nevertheless requested that the prosecutor inform the spectators that they were "right on the edge of being excluded from the courtroom and to not display their emotions while they are sitting in the courtroom." Defense counsel requested no further action.

B. Ahern Was Not Prejudiced by the Outburst or Trial Court's Efforts to Limit Its Impact.

Ahern asserts that the trial court should have investigated whether jurors had overheard the comment by Gonzales's sister because the animus against his client and the spectator's comment could have undermined defense counsel's ability to convincingly represent his theory of the case.

"A criminal defendant has the right to be tried in an atmosphere undisturbed by public passion." (*Norris v. Risley* (9th Cir. 1989) 878 F.2d 1178, 1181.) In determining whether purported misconduct at trial was "unduly suggestive of guilt," a court should be mindful that " 'the actual impact of a particular practice on the judgment of jurors cannot always be fully determined. But . . . the probability of deleterious effects on fundamental rights calls for close judicial scrutiny. Courts must do the best they can to evaluate the likely effects of a particular procedure, based on reason, principle, and common human experience.' " (*U.S. v. Olvera* (9th Cir. 1994) 30 F.3d 1195, quoting *Estelle v. Williams* (1976) 425 U.S. 501, 504.)

"The trial court has broad discretion to ascertain whether a spectator's actions were prejudicial." (*People v. Myles* (2012) 53 Cal.4th 1181, 1215.) Only spectator misconduct that would have influenced a jury's verdict will warrant a new trial. (*Ibid.*) A court may instead conclude that a comment is so *de minimis* that even if the jury heard it, there was no possibility it would affect the verdict and prejudice a defendant. (*People v. Trinh* (2014) 59 Cal.4th 216, 250.)

Here, Ahern's counsel did not request any particular remedy and may have elected not to request a curative instruction because it would have drawn attention to the outburst, which was sufficiently quiet that neither the prosecutor nor the trial court heard it. And while the trial court did not remove the spectators, it asked the prosecutor to address the inappropriate conduct with the spectators. This appears to have resolved the issue because the record is devoid of further outbursts and defense counsel never raised the issue again.

In any event, the comment and stares were not prejudicial and do not warrant a new trial. *People v. Lucero* (1988) 44 Cal.3d 1006 (*Lucero*) is instructive. In *Lucero,* the murder victim's mother became hysterical during the defendant's closing argument, yelling that the victim was screaming from the ball park when defense counsel argued that no screaming was heard from a house. (*Id.* at pp. 1021-1022.) Even after the victim's mother was removed from the courtroom, her screaming was still audible inside the courtroom. (*Id.* at p. 1022.) The trial court admonished the jurors to disregard the

outburst. (*Ibid*.) Our Supreme Court concluded that the trial court had not abused its discretion by promptly admonishing the jury to disregard the outburst. (*Id.* at p. 1024.)

Lucero presented a much stronger case than this one, and yet our high court found no abuse of discretion. The record before us indicates that the comment was inaudible to the court and the prosecutor, which means that the jury may not have heard it. The trial court had to consider whether to discuss with the jury comments it might not have heard, thereby drawing attention to those comments. The trial court avoided taking the risk of creating a problem where there was none by instead asking the prosecutor to speak with the spectators. Defense counsel never informed the court that further action to address the spectator misconduct was warranted.

It is also difficult to see how Ahern could have been prejudiced by the comment. It provided the jury with no additional information, unlike the mother's comments in *Lucero*. (*Lucero, supra,* 44 Cal.3d at pp. 1021-1022.) It was much shorter than the outburst in *Lucero*, which continued to be audible even after the mother was removed from the courtroom. (*Id.* at p. 1022.) Here, it is not even clear that the jury heard the comment as neither the judge nor the prosecutor did. The comment was also made toward the beginning of the trial by someone who wanted Ahern to be convicted and would not likely have affected the jury even if it had heard the comment.

At worst, the outburst might have led the jurors to feel sympathy for Gonzales's family members, who were visibly upset in court. But the trial court later instructed the jury to "not let bias, sympathy, prejudice, or public opinion influence [its] decision." Again, "[j]urors are presumed able to understand and correlate instructions and are further presumed to have followed the court's instructions." (*Sanchez, supra,* 26 Cal.4th at p. 852.) For all these reasons, we conclude the comment did not prejudice Ahern.

Finally, defense counsel was not ineffective for failing to request a curative instruction. We independently review the record to determine whether defense "counsel's performance was deficient," such that "counsel was not functioning as the 'counsel' [constitutionally] guaranteed," and "that the deficient performance prejudiced the defense." (*Strickland v. Washington* (1984) 466 U.S. 668, 687, 698; *Centeno, supra,*

60 Cal.4th at p. 674.) For the same reasons that the trial court did not err by failing to give a curative instruction, defense counsel did not err by failing to request one. A curative instruction would have drawn attention to a comment that contained no information and was not especially inflammatory. Moreover, Ahern cannot show that the comment would have influenced the jury and thereby prejudiced him. This claim therefore fails.

DISPOSITION

Judgment is affirmed.

STEWART, J.

We concur.

KLINE, P.J.

RICHMAN, J.

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